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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DARRYLONE SHUEMAKE, SR., Defendant and Appellant.	A153884 (Solano County Super. Ct. No. VCR226511)

Defendant Darrylone Shuemake entered into a plea agreement according to which he agreed to plead guilty to two counts of murder and one count of arson in exchange for a sentence of "Life without possibility of parole" (LWOP). The trial court then sentenced Shuemake to life without possibility of parole on each of the murder counts, to run consecutively, and eight years on the arson count. Shuemake argues that consecutive sentencing violated his plea agreement. We agree, and we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On May 22, 2016, police responded to a residential fire in Vallejo and found L.S. severely burned and walking towards the street. She told police that Shuemake had poured gasoline on her and their five-year old son, D.S., and used a lighter to start a fire. D.S. was found dead on the master bedroom floor. L.S.'s other son, then 14 years old, was also present in the home, escaped the fire, and was interviewed by police. L.S. was taken to the hospital and later airlifted to a burn trauma center.

On May 23, the Solano County District Attorney filed a complaint charging Shuemake with murder (Pen. Code, § 187, subd. (a))[1] committed during the course of an arson as a special circumstance (§ 190.2, subd. (a)(17)(H)) (count 1); attempted murder (§§ 187, subd. (a), 664) with a further allegation that he personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)) (count 2); and arson of an inhabited structure (§ 451, subd. (b)) (count 3).

On July 20, L.S. died from her injuries.

On August 15, the prosecution filed an amended complaint, replacing the attempted murder count with a second count of murder (§ 187, subd. (a)) and alleging the special circumstances that the murder was committed in the course of an arson (§ 190.2, subd. (a)(17)(H)) and that it was intentional and involved the infliction of torture (§ 190.2, subd. (a)(18)). With respect to counts 1 and 2, the amended complaint further alleged the special circumstance that Shuemake had committed multiple murders (§ 190.2, subd. (a)(3)).

On November 3, 2017, the parties entered into a written plea agreement, with handwritten information filled out on a standard form. The agreement provided that defendant would enter a plea of guilty to all three counts and admit the special circumstances of multiple murders committed in the course of an arson (§ 190.2, subds. (a)(3) & (a)(17)(H)). Handwritten into a blank following the text "The maximum punishment which the court may impose based upon this plea is," was "LWOP or the death penalty." Also handwritten after the text "Other than the promises listed below, no promises have been made to me or my family to induce me to enter this plea. I have been promised:" was "Life without possibility of parole." Shuemake initialed the agreement next to the statement "I give up my right of appeal."

[1] All undesignated statutory references are to the Penal Code.

At a hearing that same day, the court asked whether defense counsel wanted to state the resolution of the case for the record:

"MR. BOBROW [defense counsel]: Sure. Mr. Shuemake is going to enter pleas of guilty to all of the charges in the amended felony complaint and admit the enhancements alleged, except for on page 2, the second to last paragraph, that it was the intentional infliction— these intentions were committed with the intentional infliction of torture. That would be stricken, but he'd be admitting everything else. With the understanding that the People would not seek the death penalty.

"THE COURT: Basically there is an agreement to a sentence of life without the possibility of parole?

"MR. BOBROW: That is correct. And he has filled out a plea form, with my assistance, and the People have reviewed that, that states that he'd be sentenced to life without the possibility of parole. The only thing we're asking is that the actual imposition of sentencing be put over until after the first of the year.

"THE COURT: Okay. That's fine."

The trial court went on to ask Shuemake various questions regarding his understanding of the agreement, including the following:

"THE COURT: Do you understand the maximum punishment that could be imposed as a result of your plea, but the actual punishment will be as stated: Life without the possibility of parole?

"THE DEFENDANT: Yes."

And with respect to the waiver of his right to appeal:

"THE COURT: So you understand that right as well, Mr. Shuemake? There is an express waiver of your right to appeal that's on this plea agreement. [¶] . . . [¶] Now, there is an exception to that. If at the time of sentencing your plea agreement is violated in any way, shape or form, you're not giving up prospectively the right to challenge that."

"THE DEFENDANT: Okay."

At sentencing on January 5, 2018, the following discussion took place:

"THE COURT: So let me tell you what my intended sentence is. I know this is for the most part stipulated. He's ineligible for a grant of probation. I thought because there were two victims—it was one event, but some different acts in the course of that event, multiple victims, I thought I would impose consecutive life without possibility of parole terms of imprisonment as to counts 1 and 2, rely on the 190.2(a)(17) special circumstance; murder in commission of arson special to do that. Stay the count 3 under 654. I'd impose the high term, though, and stay that under 654. . . . [¶] So that's kind of my intended sentence. I'll give you each the opportunity to weigh in on that.

"MR. SEQUEIRA [prosecutor]: The matter is submitted.

"MR. BOBROW: Judge, on the consecutive, I mean, not that it has—I don't think it will have any practical effect, but the plea agreement was life without the possibility of parole for both offenses, not two separate life without the possibility of paroles, and that's what he pled to.

"THE COURT: Okay. Well, if that was the plea agreement, then I'll abide by the plea agreement. I didn't see that as part of the plea agreement. I don't know that I inquired.

"MR. SEQUEIRA: When we did the plea agreement, we really—to be honest, we didn't talk about that. We talked about life without parole and taking it off the table. I have to say that, you know, it's somewhat academic, but I think to be fair, the Court has a discretion because it was not contemplated within the agreement and we just said life without parole, unless Mr. Bobrow has a different memory than I do.

"MR. BOBROW: No, I think that's accurate. The plea form says life without the possibility of parole, it just doesn't say two separate counts of consecutive life without the possibility of parole.

"THE COURT: I understand, but, I mean, if it was—if concurrent sentencing was bargained for, I'll abide by that. If it wasn't, I intend to impose consecutive sentencing.

Given what I heard today, what I read, the fact there were multiple victims and the acts—all the acts within the home that contributed to this event, it just seems like consecutive sentencing is warranted.

"MR. BOBROW: Again, I don't think it has any practical effect, so I'd submit."

"THE COURT: Okay. So I'll deny Mr. Shuemake a grant of probation for the first degree murder conviction in count 1, coupled with the 190.2(a)(17) special circumstance that he admitted to.

"I'll impose a term of imprisonment, life imprisonment without the possibility of parole.

"I'll impose the same term in count 2, relying on the same special circumstance to do that. I'm going to have that run consecutive to the sentence imposed on count 1 for the reasons I already indicated, but I'll recite them again: There were two different victims. There was one event, but different acts within that event that led to the demise of both victims. You know, that's the primary reason. The child victim, the five-year-old, was also particularly vulnerable. So to me this is a consecutive sentence situation, really, hands down."

The trial court imposed the high term of eight years on count 3, and stayed that term under section 654. Defense counsel objected once more to the consecutive sentences:

"MR. BOBROW: No. I mean, Mr. Shuemake is—clearly wants it on the record that his understanding was he was pleading to one sentence of life without the possibility of parole. And I told him the practical effect of a consecutive sentence is the same sentence. I mean, life without parole is life without parole. And I think it's appropriate to object to a consecutive sentence to a second life without the possibility of parole. We just want that on the record."

On March 7, defendant filed a notice of appeal, dated March 6.

DISCUSSION

The Attorney General argues that Shuemake's appeal should be dismissed because his notice of appeal was untimely, because he failed to obtain a certificate of probable cause, and because the plea agreement contains a waiver of his right to appeal. The parties further disagree as to the interpretation of the plea agreement, and about whether specific performance or the opportunity to withdraw the plea is the appropriate remedy for any violation of that agreement.

Late Notice of Appeal

The Attorney General first argues that this appeal should be dismissed as untimely.[2] The parties do not dispute that the deadline to file a notice of appeal was March 6, 60 days after judgment was entered on January 5. (See Cal. Rules of Court, rule 8.308, subd. (a).)

On January 18, 2019, after the opening and respondent's brief had been filed, Shuemake filed an unopposed motion for constructive filing and to permit late filing of his notice of appeal, attaching a declaration from his trial counsel. According to that declaration, after the sentencing hearing on January 5, Shuemake told his trial counsel that he wished to appeal. Trial counsel calculated the deadline for filing an appeal as March 6, and on that date, he prepared and signed a notice of appeal and placed it with papers to be filed that day, according to the practice of his office. However, it was inadvertently not filed until the next day. Under these circumstances, we will conclude that Shuemake's notice of appeal was constructively filed on March 6 and is therefore timely. (See *In re Benoit* (1973) 10 Cal.3d 72, 86 [constructive filing "should be extended to apply to situations like the instant one where the defendant is incarcerated or otherwise in custody after having been properly notified of his appeal rights by the

[2] On May 3, 2018, we issued an order dismissing this appeal as untimely. The next day, on our own motion, we vacated that order and returned the appeal to active status.

sentencing judge and has made arrangements with his trial attorney to file a notice of appeal for him"].)

Failure to Obtain a Certificate of Probable Cause

The Attorney General next argues that Shuemake's appeal should be dismissed for failure to obtain a certificate of probable cause.

A defendant must file a certificate of probable cause to appeal from a judgment after a plea of guilty, except, as relevant here, where the appeal is based on "[g]rounds that arose after entry of the plea and do not affect the plea's validity." (Cal. Rules of Court, rule 8.304(b)(4)(B); see § 1237.5; *People v. Cuevas* (2008) 44 Cal.4th 374, 379.)

Authority interpreting the certificate of probable cause requirement "draws a line between pleas in which the parties agree that the court will impose a specific, agreed-upon sentence, and pleas in which the parties agree that the court may impose any sentence at or below an agreed-upon maximum. A certificate of probable cause is required for the former (*People v. Cuevas*, *supra*, 44 Cal.4th at pp. 381–382; [*People v.*] *Panizzon* [(1996)] 13 Cal.4th [68,] 78–80; see generally [*People v.*] *Johnson* [(2009)] 47 Cal.4th [668,] 678), but not the latter (except where the defendant challenges the legal validity of the maximum sentence itself) (*People v. French* (2008) 43 Cal.4th 36, 45–46; *People v. Buttram* (2003) 30 Cal.4th 773, 777, 790–791; cf. *People v. Shelton* (2006) 37 Cal.4th 759, 763 (*Shelton*) [certificate of probable cause required to challenge validity of agreed-upon maximum sentence under [section] 654])." (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 55–56.) This is because "[w]here the parties agree to a specific sentence, the court's '[a]cceptance of the agreement binds the court and the parties to the agreement' (*People v. Segura* (2008) 44 Cal.4th 921, 930), and a defendant's challenge to the specific sentence is '*in substance* a challenge to the validity of the plea' (*Panizzon*, at p. 76, original italics)." (*Hurlic*, *supra*, at p. 56.)

Characterizing Shuemake's appeal as a "challenge to the negotiated sentence," the Attorney General relies on the above authority to assert that a certificate of probable

cause was required. But this characterization is not accurate, because the parties' disagreement here is about what the "negotiated sentence" is, not whether it can be or was lawfully imposed. This distinguishes all the cases relied on by the Attorney General, each of which involved the latter kind of dispute. (See *People v. Panizzon*, *supra*, 13 Cal.4th at pp. 78–79; *People v. Cuevas*, *supra*, 44 Cal.4th at p. 381; *People v. Shelton*, *supra*, 37 Cal.4th at p. 763.) Furthermore, Shuemake's appeal does not in any way challenge the validity of the plea agreement. To the contrary, he seeks to have that plea agreement, as he interprets it, specifically enforced. We conclude that no certificate of probable cause was required.

Waiver of Right to Appeal

The Attorney General next argues that Shuemake's appeal should be dismissed because the plea agreement contains a waiver of his right to appeal, namely, his initials next to the statement: "I give up my right of appeal."

A defendant may waive the right to appeal as part of a plea bargain where the waiver is knowing, intelligent and voluntary. (*People v. Panizzon*, *supra*, 13 Cal.4th at p. 80.) "[A] waiver that is nonspecific, e.g., 'I waive my appeal rights' or 'I waive my right to appeal any ruling in this case,' " is considered a general waiver. (*Id*. at p. 85, fn. 11.) "A broad or general waiver of appeal rights ordinarily includes error occurring before but not after the waiver because the defendant could not knowingly and intelligently waive the right to appeal any unforeseen or unknown future error. [Citation.] Thus, a waiver of appeal rights does not apply to ' "possible future error" [that] is outside the defendant's contemplation and knowledge at the time the waiver is made.' " (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815.)

"The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver. [Citation.] The right of appeal should not be considered waived or

abandoned except where the record clearly establishes it. [Citation.]" (*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662.)

The waiver in this case was general, and would thus not ordinarily encompass sentencing error that took place after the agreement was signed, such as Shuemake alleges here. Nor can it be said that it was within Shuemake's "contemplation and knowledge" that, having reached an agreement for a particular sentence, he was waiving his right to appeal should the trial court violate the parties' agreement and impose a different one. (See *People v. Vargas*, *supra*, 13 Cal.App.4th at pp. 1661–1662 [finding no waiver of right to appeal erroneous calculation of conduct credits that took place after plea entered].)[3] Indeed, as noted, the trial court expressly told Shuemake that "[i]f at the time of sentencing your plea agreement is violated in any way, shape or form, you're not giving up prospectively the right to challenge that." Such a violation is precisely what Shuemake alleges here. We conclude that the Attorney General has not demonstrated that Shuemake waived his right to appeal his sentence.

The Plea Agreement Requires Concurrent Sentencing

We turn to the merits of Shuemake's appeal and the question of what is meant by the plea agreement's provision that he would receive a sentence of "Life without the possibility of parole."

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. (*People v. Toscano* (2004) 124 Cal.App.4th 340, 344;

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[3] Several courts have opined in dicta that a waiver of the right to appeal would not prevent an appeal where the sentence imposed was not the one agreed on. (See *People v. Olson* (1989) 216 Cal.App.3d 601, 604, fn. 2 ["Waiver of the right to appeal would not prevent an appeal where the sentence imposed is not in accordance with the negotiated agreement or other sentencing error occurs"]; *People v. Nguyen* (1993) 13 Cal.App.4th 114, 121 ["The defendant always retains the right to complain the sentence was in excess of the bargain"]; *People v. Panizzon*, *supra*, 13 Cal.4th at p. 85 ["[A] defendant's general waiver of the right to appeal, given as part of a negotiated plea agreement, will not be construed to bar the appeal of sentencing errors [unresolved by the particular plea agreement] occurring subsequent to the plea [fn. omitted]"].)

People v. Gipson (2004) 117 Cal.App.4th 1065, 1069; *People v. Haney* (1989) 207 Cal.App.3d 1034, 1037; *People v. Alvarez* (1982) 127 Cal.App.3d 629, 633.) 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) On the other hand, "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (*Id.*, § 1649; see *AIU* [*Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807,] 822.)' (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264–1265.) 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. (Civ. Code, §§ 1635–1656; Code Civ. Proc., §§ 1859–1861, 1864; [citations].)' (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912; see also *People v. Toscano*, *supra*, at p. 345.)" (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) The interpretation of a plea agreement is subject to de novo review where the interpretation does not turn on the credibility of extrinsic evidence. (*People v. Paredes* (2008) 160 Cal.App.4th 496, 507.)

As noted, the plea agreement provides that Shuemake will plead guilty to two counts of murder and one count of arson, that the "maximum punishment that the court may impose based upon this plea is: LWOP or the death penalty," and that in exchange for his plea Shuemake had "been promised: Life without the possibility of parole." The agreement makes no mention of consecutive or concurrent sentencing, nor does it anywhere break down the agreed-upon sentence as to each of the three charges. It is thus uncertain what is meant by "Life without the possibility of parole."

Shuemake reads "Life without the possibility of parole" as a maximum sentence to be served on all three charges, i.e., as requiring concurrent sentencing. Although his argument is not entirely clear, the Attorney General appears to contend that the promised sentence was a maximum on each charge, reasoning that "[s]ince [Shuemake] could not have bargained for a 'single sentence' [citation] based on three separate convictions, the promised LWOP sentence can only be construed as a lid, rather than an agreement that sentence terms would be concurrent."

We interpret the promise of "Life without possibility of parole" in the sense in which the prosecution believed, at the time of making it, that Shuemake understood it. We conclude that he would have understood it, as he argues, as the total length of the sentence to be served for all three charges. The prosecution could not have believed Shuemake understood it as either a specified sentence on each charge or as a maximum on each charge, because the arson charge had a statutory maximum of eight years.[4] (§ 451, subd. (b); see *People v. Shelton*, *supra*, 37 Cal.4th at p. 768 ["Thus, the specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term"].) We conclude that the trial court departed from the plea agreement in ordering consecutive sentencing.

[4] The Attorney General also argues that because the probation report filed January 5 contains the word "LWOP" under a column with the heading "CC CS," consecutive sentencing "should have been no surprise." We do not agree that this report, which appears to be a standard form, shows that the parties anticipated consecutive sentencing. And more importantly, the report did not yet exist when Shuemake entered his plea and executed the plea agreement on November 3. Accordingly, it is of limited, if any, relevance in the interpretation of that agreement.

Shuemake Is Not Entitled to Specific Performance of the Plea Agreement

We turn to the question of the appropriate remedy. Shuemake argues that we should order specific performance of the plea agreement, and the Attorney General argues that we should direct the trial court to permit Shuemake the opportunity to withdraw his plea.

"The usual remedies for violation of a plea bargain are to allow the defendant to withdraw the guilty plea and stand on trial on the original charges, or to specifically enforce the plea bargain. Withdrawal of the plea is the appropriate remedy when specifically enforcing the bargain would limit the trial court's sentencing discretion in light of additional information or changed circumstances between acceptance of the plea and sentencing. Specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial court to a disposition it considers unsuitable under all the circumstances." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860–861; see *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362 (*Kim*).)

However, "a defendant should not be entitled to enforce an agreement between himself and the prosecutor calling for a particular disposition against the trial court absent very special circumstances. The preferred remedy in that context is to permit a defendant to withdraw his plea and to restore the proceedings to the original status quo. [Citation.] . . . Specific enforcement of a particular agreed upon disposition must be strictly limited because it is not intended that a defendant and prosecutor be able to bind a trial court which is required to weigh the presentence report and exercise its customary sentencing discretion." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 13–14, fn. omitted.)

"[T]he sentencing court is *not* bound by [the] plea bargain, but is empowered to disapprove it and deny it effect, at least so long as the parties can be restored to their original positions. This principle is codified as part of an admonition the court is required to give when a plea bargain is placed before it, i.e., it must 'inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for

the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so.' (Pen. Code, § 1192.5.) Implicit in this language 'is the premise that the court, upon sentencing, has broad discretion to withdraw its prior approval of a negotiated plea.' [Citations.]" (*Kim*, *supra*, 193 Cal.App.4th at pp. 1360–1361, fn. omitted.) "Such withdrawal is permitted, for example, . . . where the court becomes more fully informed about the case [citation], or where, after further consideration, the court concludes that the bargain is not in the best interests of society. [Citation.]" (*People v. Superior Court (Gifford)* (1997) 53 Cal.App.4th 1333, 1338.)

As discussed, we interpret the plea agreement to call for concurrent sentencing, and so specific performance would "implement the reasonable expectations of the parties." (*People v. Mancheno*, *supra*, 32 Cal.3d at p. 861.) But it is not entirely clear whether the trial court intended to exercise its discretion to depart from the plea agreement. Although the court twice told the parties before pronouncing sentence that it intended to abide by the plea agreement, it never indicated its understanding of the plea agreement's terms, nor whether it understood its sentence to be a departure from those terms. (See *Kim*, *supra*, 193 Cal.App.4th at pp. 1358–1359, 1365 [remand appropriate where trial court did not "indicate whether it was acting in conformity with the terms of the bargain as it understood them, or intended instead to deviate from those terms"].) Nor did it offer Shuemake the opportunity to withdraw his plea, as would have been required under section 1192.5 had the court intended to withdraw its approval of the agreement. (See *Kim*, *supra*, 193 Cal.App.4th at pp. 1360–1361; *People v. Silva* (2016) 247 Cal.App.4th 578, 587 ["If the court withdraws its initial approval, it must inform the defendant that he or she has the right to withdraw the plea and allow the defendant to do so; it cannot merely alter the terms of the agreement by imposing punishment significantly greater than that originally bargained for"].) Accordingly, this case does not

present the sort of "very special circumstances" where specific enforcement of the plea agreement is appropriate. Instead, we will remand the matter for the trial court to either sentence Shuemake concurrently or to withdraw its approval of the agreement and permit him the opportunity to withdraw his plea. (See *Kim*, *supra*, 193 Cal.App.4th at pp. 1365–1366.)

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to either: (1) resentence defendant to a single term of life without possibility of parole, all other terms to run concurrently, in accordance with the parties' plea agreement or (2) withdraw its approval of that agreement and expressly offer defendant the opportunity to withdraw his plea pursuant to section 1192.5. If defendant chooses to withdraw his plea, the matter shall proceed as if no plea had been entered.

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Richman, J.

We concur:

_____
Kline, P. J.

_____
Miller, J.

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